STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2011
v	Nos. 300603; 300616 Kent Circuit Court
JEFFERY JOHN HANSEN, Defendant-Appellant.	LC Nos. 09-012145-FH; 09-007309-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant was convicted of numerous crimes after a consolidated jury trial. In Docket No. 300603, defendant appeals as of right his convictions of possession of child sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, MCL 752.796(1); MCL 752.797(3)(d). In Docket No. 300616, defendant appeals as of right his conviction of two counts of first-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520b(1)(a). This Court consolidated defendant's appeals. We affirm.

In 2009, defendant was living with the victim—his seven-year-old stepdaughter. Defendant sexually assaulted the victim by putting his penis in her mouth and both his penis and a "purple toy" in her anus. The victim ultimately disclosed the sexual assault to her grandmother and, later, to her mother and her mother's friend. After the disclosure, law enforcement officers searched defendant's home, where the victim assisted the police in locating the purple toy. Police also seized defendant's laptop computer and a large, portable external storage drive. The computer contained 11 child-pornography movies, and the storage drive contained 16 child-pornography movies.

Defendant first argues that the trial court erred by consolidating the charged offenses for trial. However, defendant waived this issue by affirmatively acquiescing in joinder of the charged offenses for trial. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant next makes three unpreserved arguments of evidentiary error. We review unpreserved issues for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

First, defendant argues that Jamie Noorman, the physician's assistant who examined the victim, was not qualified to testify regarding the ultimate issue in the criminal sexual conduct

case. Specifically, defendant claims that Noorman based her opinion that "something had happened" solely on the child's emotional state and the history she gave, which amounted to an assessment of the child's credibility. A medical professional testifying as an expert in a sexual assault case may not offer a purely subjective opinion that the victim told the truth. *People v Smith*, 425 Mich 98, 109, 113; 387 NW2d 814 (1986) (explaining that a physician's testimony that a victim was sexually abused was an improper opinion where the testimony was not based on any medical findings but, rather, the victim's emotional state and statement that she had been raped). However, it is "well-established that expert opinion testimony will not be excluded simply because it concerns the ultimate issue." *Id*. at 106; see also MRE 704. A review of the record reveals that Noorman testified to the finding of protein and blood in the victim's urine, which was consistent with a bladder infection, and that protein in the urine can also be consistent with semen. On cross-examination, Noorman explained that her testimony was based on the victim's physical examination in conjunction with the victim's statements. Noorman's opinion that "something had happened" to the victim was not based solely on the victim's statements to her; rather, it was also on the basis of her expertise as a physician's assistant and observations during her physical examination of the victim—particularly her observation that the victim had a bladder infection for the first time in her life. In sum, there is no plain error because the testimony was admissible.[1]

Second, defendant argues that the mother's friend improperly testified regarding other-acts evidence when she described her conversation with the victim detailing defendant's masturbation in the victim's presence.[2] For other-acts evidence to be admissible, the evidence must be offered for a proper purpose, must be relevant, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Knox*, 469 Mich at 509. Here, even assuming that the admission of this testimony was plain error, we find that the error would not warrant reversal because defendant has not established that its admission affected the outcome of his trial. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Evidence that defendant was masturbating at night while watching an unspecified movie at a time when he believed the victim was sleeping was not so unfairly prejudicial as to move the jury to convict defendant for improper reasons. Furthermore, the testimony of the victim, Noorman, the examining physician at the Children's Assessment Center, the detective who executed the search warrant on defendant's home, the digital media expert, and the remaining testimony of the mother's friend was strong evidence that defendant committed the crimes charged.

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[1] Defendant vaguely argues that the physician's assistant's testimony that she followed up with the victim's mother because she feared that the victim's mother may not report the incident to the police was irrelevant and inadmissible. However, defendant provides no analysis of the issue; thus, it is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

[2] Defendant has not raised MRE 803A as a challenge to the mother's friend's testimony regarding what the victim told her.

Third, defendant argues that the digital media analysis expert improperly testified about the "Vicky" child-pornography movie series because the testimony was irrelevant and unfairly prejudicial "civil duty testimony." Defendant's contention that the testimony was "civic duty testimony" is meritless; a review of the record reveals that the description was made in the context of explaining some acronyms and titles used on the list of downloads from defendant's computer. Moreover, the testimony was relevant because the fact that a "Vicky" child-pornography movie was downloaded to defendant's computer had a tendency to make the existence of defendant's possession of child sexually abusive material more probable than it would have been without the testimony. See MRE 401. Thus, there is no plain error because the testimony was admissible.

Defendant next argues that insufficient evidence existed to prove that he knowingly possessed child sexually abusive material, MCL 750.145c(4). We review de novo a challenge on appeal to the sufficiency of the evidence, examining the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determining whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Our Supreme Court has held that "the term 'possesses' in the phrase '[a] person who knowingly possesses any child sexually abusive material' in MCL 750.145c(4) includes both actual and constructive possession." *People v Flick*, 487 Mich 1, 4; 790 NW2d 295 (2010). "[A] defendant constructively possesses 'any child sexually abusive material' when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons." *Id*. at 15.

Here, the prosecution presented evidence that defendant downloaded 11 child-pornography movies to his computer and another 16 on a portable storage hard drive. The jury viewed two of these movies. The evidence in this case supports a finding that defendant constructively possessed the child sexually abusive material where he intentionally searched for child-pornography movies, downloaded them to his computer, and saved them in hidden files. The evidence also supports a finding that defendant had the power and the intent to exercise dominion or control over the child-pornography movies by saving them to a hidden folder on his internal hard drive and also onto a portable external hard drive. See *id*. Viewing the evidence in a light most favorable to the prosecution and resolving all evidentiary conflicts in its favor, a rational trier of fact could have found beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material. See *Ericksen*, 288 Mich App at 196. Defendant emphasizes that the prosecution only proved that he viewed one adult-pornography movie. However, whether defendant viewed the child-pornography movies is not a relevant inquiry with respect to whether he knowingly possessed child sexually abusive material.

Defendant also argues that he is entitled to a new trial and the opportunity for a polygraph examination where he requested and paid for a polygraph examination under MCL 776.21(5) but did not receive one. We review this unpreserved issue for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763. MCL 776.21(5) provides that "[a] defendant who allegedly has committed [first-degree criminal sexual conduct] shall be given a polygraph examination or lie detector test if the defendant requests it." In this case, the record reveals that defendant wrote a letter to his defense counsel insisting that he be given a polygraph examination, and he sent a copy of the letter to the trial court judge before trial. Defendant has

not established, however, that his failure to receive the examination affected the outcome of the lower court proceedings. See *id.* It is speculative whether he would have passed a polygraph examination if one had been administered. And, even if he had passed a polygraph examination, the results would have been inadmissible at trial. *People v Phillips*, 469 Mich 390, 397; 666 NW2d 657 (2003). Furthermore, defendant has also not shown that a "passed polygraph" would have affected the prosecutor's plea offer, the prosecutor's decision to proceed to trial, or his sentence. Accordingly, defendant is not entitled to relief on this issue.

Defendant next argues that he was denied the effective assistance of counsel. Defendant failed to move for a new trial or an evidentiary hearing with regard to his claims of error concerning defense counsel's agreement to consolidate the charged offenses for trial and for failing to object to certain testimony; therefore, those claimed instances of ineffective assistance of counsel are unpreserved. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *Id*. Defendant moved this Court for, but was denied, a remand for a *Ginther*[3] hearing concerning defense counsel's failure to arrange for a polygraph examination; therefore, this claimed instance of ineffective assistance of counsel is preserved. *Id*. We review preserved claims of ineffective assistance of counsel where no *Ginther* hearing was held for errors apparent in the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of professional reasonableness and a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different. *Id*.

Defendant argues that defense counsel was ineffective for agreeing to consolidate the charged offenses for trial. However, the offenses were related under MCR 6.120(B)(1)(b) because they were based on a series of connected acts: defendant's sexual abuse of the victim that led to the discovery of defendant's possession of child sexually abusive material. The trial court properly exercised its discretion in granting the prosecution's motion to consolidate the charged offenses where evidence that defendant committed a listed offense against a minor would be admissible in each case under MCL 768.27a if the cases were tried separately. Furthermore, the relevant factors set out in MCR 6.120(B)(2) supported joinder of the charged offenses. Thus, any objection to consolidation would have been futile, and counsel was not ineffective for failing to make a futile objection. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also argues that defense counsel was ineffective for failing to object to the testimony of the mother's friend regarding other-acts evidence, Noorman's testimony regarding the ultimate issue in the criminal sexual conduct case, and the digital media expert's testimony regarding the "Vicky" child-pornography movies. As previously discussed, Noorman's testimony and the digital media expert's testimony were admissible. Thus, any objections to the admission of this evidence would have been futile, and counsel was not ineffective for failing to

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

make a futile objection. See *id*. With respect to the mother's friend's testimony about the victim describing her observation of defendant masturbating, the prosecution argues that defense counsel strategically used the masturbation episode in her closing argument as an innocent explanation for the victim's knowledge of sexual conduct. We find that while it was inadmissible other-acts evidence, defendant has not established a reasonable probability that the result of his trial would have been different but for defense counsel's failure to object to the admission of this evidence. See *Jordan*, 275 Mich App at 667. The testimony was not so unfairly prejudicial as to move the jury to convict defendant for improper reasons. And, there was strong evidence of defendant's guilt as established by the other evidence presented at trial.

Defendant also argues that defense counsel was ineffective for failing to arrange for a polygraph examination pursuant to his request. Although the record illustrates that defendant requested a polygraph examination, defendant is unable to establish a reasonable probability that, but for defense counsel's failure to obtain a polygraph examination, the result of the proceeding would have been different. See *id.* Defendant has not shown that a polygraph would have been favorable to him. Defendant also cannot show that it would have affected the prosecutor's plea offer, the prosecutor's decision to proceed to trial, or his sentence. Moreover, the results would have been inadmissible at trial. See *Phillips,* 469 Mich at 397.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering